

[This concerns a Bill of Suspension to be reported by the Lord PRESTONCRANGE.]

July 15. 1756.

MEMORIAL

F O R

Andrew Wallace Writer to the Signet, Charger;

A G A I N S T

James Earl of *Abercorn*, Suspender.

THAT the Memorialist may make the Case the better understood, it is necessary; in the Entry, to state to your Lordships the following Facts.

The deceased *John Biggar*, eldest lawful Son of the deceased *William Biggar* of *Woolmot*, the Memorialist's Brother and Predecessor, was possessed of considerable Coal-works lying within the Grounds of the Estate of *Woolmot, Edmonston, &c.*; and as he applied his whole Time to the Improvement and Management of Coal-works, he formed a more extensive Plan, of getting into his Possession other Coal-works lying in the Neighbourhood, and interjected betwixt him and the Sea; particularly the Coal of *Duddingston*, belonging to the Earl of *Abercorn* the Suspender, lying next to the Sea-shore; and the conterminous Coal thereto, belonging to *Mr Wauchop* of *Niddry*.

The first of these, having been long wrought below Level by a Water-engine, was not believed to be of great Value; but one sensible Advantage could be reaped from it, by giving *Mr Biggar* an Opportunity of running a Level through these Grounds.

In prosecution of this Scheme, *Mr Biggar*, in the 1746, entered into a Tack with the Earl of *Abercorn*; whereby he became bound to work his Coal at *Duddingston*, "when it was possible to work it to any Advantage, and to pay therefor the tenth Part of what ever Coal, great or small, as should be wrought out of the Seams in the said Lands;" also became bound to pay yearly to the Earl the Sum of *L. 48, 6 s. Sterling*, whether the Coal was wrought or not, as the Rent of some Salt Pans and Houses, and a few Acres of Ground: And further, in order to make his great and favourite Scheme effectual, the Tack contains this following Clause, "That it shall be in the Power of either of the said Parties, or their forefairs, if they shall hereafter find it necessary, to communicate the Level of the said Coal to any neighbouring Coal-work; providing always that they be obliged, likeas they hereby bind and oblige them and their forefairs, to submit to Arbiters to ascertain the Consideration to be paid by any one of the said Parties to the other on that Account; upon Payment whereof both the said Parties are hereby obliged to consent and agree to such communicating reciprocally." The Tack is for the Space of nineteen Years.

Mr Biggar, and the Memorialist now his Successor, were not deceived in their Apprehensions, that the Coal of *Duddingston* would not be of long Duration, as it cannot now be wrought without the enormous Expence of a Fire-engine, which it cannot afford: But the Memorialist, for some Time past, has been running a Level at a very great Expence, which, in a short Time, may be communicated to the Coal-work belonging to *Mr Wauchop* of *Niddry*, of which the Memorialist is likewise Tacksman; which he apprehends himself intitled to do, in terms of his Tack and Agreement with the Earl of *Abercorn*.

The Earl has offered this Bill of Suspension, upon two Reasons: 1st, "Supposing the Memorialist may have the Right of communicating the Level to the Coal of *Niddry*, as being in the Neighbourhood, and adjacent to *Duddingston* Coal; yet this Communication cannot be perpetual, but can only continue during the Subsistence of the Tack."

2^{do}, "That the Level cannot be communicated, so as to introduce into it the Water of other Coaleries which are not neighbouring or adjacent to the Coalery of *Duddingston*."

With respect to the first, your Lordships have already heard the Clause of the Tack, which

which is conceived in strong and general Words, That either of the Parties should be at Liberty to communicate the Benefit of the Level. And this Power or Faculty is no wise restricted or limited in point of Duration, but is vested equally in both Parties. It cannot be disputed, that the Earl might communicate it in all Time coming, and the Tacksman is put upon the same Footing. No Rule of Construction permits the same Words and Expressions to be taken in different Senses, when the Parties have applied them to both equally; and therefore appear to have vested the same *Right* in both, of communicating the Benefit of the Level as they should see Cause. And the Clause was just and reasonable, when it is considered, that, in consequence of such Communication, if made by the Tacksman, the Earl the Proprietor was to receive a full and adequate Price, to be determined, in case of Difference, by Arbiters mutually chosen.

This Construction is supported by the Clause which obliges the Parties reciprocally to consent to such Communication given by the other; that is, in other Words, obliging either of the Parties to consent; for the Right in their Persons, and the Right in the Earl, was undoubtedly perpetual.

As the Tacksman was obliged to work the Coal of *Duddingston* when it was workable, paying no less than a tenth of the gross Produce, and in every Event to pay a high Rent for the other Subjects, during the Currency of the Tack; there was no Reason or Equity for obliging him to pay any Consideration to the Earl on account of his taking the Advantage of the Level, even to assist another Coal, if such Communication was only during the Subsistence of the Tack; because the Earl getting the full Advantage and Benefit of his own Works, during the Currency of it, neither Reason nor Justice permitted him to envy an accidental Advantage arising from the Level to the Memorialist. But taking the Clause in the Light the Memorialist now humbly pleads, that such Communication was to be perpetual, and the Earl was obliged to interpose his Consent to make it effectual, then indeed a Recompense was both just and equitable, when the Benefit arising from this Communication was to continue, even beyond the Years of the Tack.

Such humbly appearing to the Memorialist to be the equitable Construction, it surely ought not to be limited or restricted, when the Words do not infer any such Limitation; and when, in truth, the extensive Interpretation now insisted for, works no Prejudice to the Earl, who, it is agreed, is to be paid an adequate Price.

As to the *second* Reason of Suspension, it proceeds upon the Supposition or Admission, that the Memorialist had Power of giving the Communication to a neighbouring or adjacent Coal-work: And therefore this being once established, that the Memorialist can communicate the *Duddingston* Level to the *Niddry* Coal, in doing it, *jure suo utitur*; and any consequential or accidental Advantage that may arise from it, either to the Memorialist as Tacksman, or to *Niddry* as Proprietor of the Coal-work to which it is communicated, does not regard the Earl, who is not intitled to inquire into the Method these Neighbouring Coals may be wrought, or into any Agreement amongst other Coal-masters, to which he is no Party. The Earl has no Right to limit or restrict *Niddry* in the Method of working his Coal, when it does not interfere with the Lands of *Duddingston*. Suppose the Memorialist no wise concerned in *Niddry* Coal, and that either he, in terms of the Clause, or the Earl himself, had for a Piece of Money communicated this Level to *Niddry*; surely there could be no implied Restriction in such Bargain, as could have been construed to infer an Obligation upon *Niddry*, not to work through upon the March of *Edmonston*, or any other Heritor, when he found it his Advantage do to so. And your Lordships will please observe, that it cannot be pretended in this Case, for the Nature of the Thing renders it impossible, that the opening of the Level from *Niddry* Coal, to *Edmonston* or *Woolmot* Coal, can ever discharge such a Quantity of Water, as to be in the least incommodious to the Earl. The Memorialist knows no Coal-works that can yield such a Quantity of Water as cannot be discharged from the Level. Could such a Thing be supposed, it would be foolish and absurd in the superior Heritors to attempt it; because it would certainly drown their own Works, and render them useless.

In a Word, what the Memorialist now pleads, is supposed to be well founded in the very Terms of his Tack, empowering to communicate the Benefit of the Level to this neighbouring Coal; and the Earl is obliged to give his Consent thereto; and then, upon the common Principles, he is intitled to reap every accidental or consequential Benefit that can arise from such Communication.

: In respect whereof, &c.

RO. DUNDAS.